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CITATIONS

721987—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 635

MCCRADY CONSTRUCTION CO., PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 113–135) is reported at 60 F. Supp. 243; its findings of fact and conclusions of law appear at pages 142–199 of the record. The opinion of the Circuit Court of Appeals (R. 201–209) is reported at 156 F. 2d 932.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 23, 1946 (R. 209–210). The petition for certiorari was filed on October 22, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether employees engaged in the repair, reconstruction or replacement of highways, roads, telephone lines and railroad facilities, all of which are regularly used for interstate transportation or communication, are engaged "in commerce" within the meaning of the Fair Labor Standards Act.

2. Whether employees engaged in the repair, maintenance, reconstruction or expansion of existing industrial plants producing goods for interstate commerce are engaged in "a process or occupation necessary to the production" of such goods within the meaning of the Act.

STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, are as follows:

> SEC. 3. As used in this Act—
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> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall

be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

STATEMENT

This action was instituted by the Administrator of the Wage and Hour Division, United States Department of Labor, to restrain petitioner, a construction contractor, from violating the provisions of the Fair Labor Standards Act (R. 113). The District Court granted the injunction prayed (R. 136–137), and the Circuit Court of Appeals for the Third Circuit affirmed this judgment (R. 209–210). Petitioner concedes that it has not complied with the Act, and that the Act is applicable to the work performed on 19 of the 58 projects involved in this action (Pet. 4). The petition is concerned with the remaining 39 projects (Pet. 5). These projects involved work relating (1) to instrumentalities of interstate commerce and (2) to facilities used in the production of goods for commerce.

1. *Work related to instrumentalities of commerce.*—This work falls into three main categories:

a. Repair, reconstruction or relocation of U. S. Highways 22 and 30 which interconnect several

States, and of other roads and streets which connect with those or other interstate highways (R. 155–167). All the streets and highways in question were used "to a substantial extent" by vehicles transporting persons and goods in interstate commerce (R. 155–156).[1] The work involved in the repair of highways included the relocation and repair of bridges and of the approaches thereto, the repair of drainage and curbing on the highways, and the replacement of sidewalks (R. 157–167).

b. Relocation of existing telephone lines, and the laying of a new conduit, partly through existing ducts, to relieve the load on an existing line (R. 168–171). The telephone lines in question were all regularly and continuously used for interstate communication (R. 169–171).

c. Repair, construction and replacement of various operating and maintenance facilities, such as a bridge, a roundhouse and a storehouse building

[1] Petitioner challenges the finding of the district court that all the highways, roads, and streets were used to a substantial extent in interstate commerce. This finding is fully supported by the evidence (see R. 73–97, 118, 138–139). Moreover, this Court will "not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U. S. 220, 227; *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178. In any event, the regular and continuous interstate usage of the roads conceded by petitioner (Pet. 12) would suffice to make them "instrumentalities of interstate commerce." *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 129; cf. *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178.

(R. 172–176), necessary to the proper functioning of the Union Railroad. This railway interchanges freight with other railroads at twenty-two points and also moves freight within steel plants, dumps their waste, and hauls steel products and raw materials between mills and between the various trunk lines and the mills (R. 171). A substantial amount of the freight carried by the railroad moved in interstate commerce (R. 172).

2. *Work related to facilities used in the production of goods for commerce.*—These projects involved various kinds of maintenance, repairs, replacement and construction of plant facilities in three large industrial establishments which ship their products in interstate commerce (R. 179–193). Some of the work constituted repair, maintenance, reconstruction and modification of existing facilities, such as the maintenance of plant grounds and roadways, the prevention of erosion and landslides, and the construction of a concrete trench to enlarge and improve existing acid disposal facilities (R. 179–190). The remainder of the work involved "the construction of new units which were designed for use in the production of particular goods. These new units were all integral parts of existing plants, and were constructed to enlarge or replace outmoded buildings and machinery, and thus to continue the operation of the plant as a whole" (R. 130). The construction of an electrolytic tinning plant

at the Irvin Works of the Carnegie-Illinois Steel Corporation, for the more efficient accomplishment of the tinning process in the manufacture of tin plated steel, is an illustration of this type of project (R. 190–191).

Both courts below found that the activities of petitioner's employees on the highway, telephone line and railroad projects were so closely related to the functioning of these instrumentalities of interstate commerce as to be "in commerce" within the meaning of the Act. The courts further held that the work involving the repair, maintenance, reconstruction and expansion of industrial plants constituted a "process or occupation necessary to the production" of goods for commerce within the scope of the Act (R. 135, 201–209).

ARGUMENT

It is our view that the decision below correctly applies the principles established by this Court and does not conflict with the decision of any circuit court of appeals. The case does involve an important application of the Act to many aspects of the construction industry; but we doubt that this alone justifies the granting of certiorari.

1. The decision of the court below that employees working on the highway, railroad, and telephone projects were "engaged in commerce" within the meaning of the Act is in accord with *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, and *Pedersen* v. *J. F. Fitzgerald Const. Co.*, 318

U. S. 740, 324 U. S. 720. In the *Overstreet* case employees engaged in maintaining and repairing an interstate vehicular road and bridge were held engaged in commerce. A similar result was reached in the *Pedersen* case with respect to employees constructing new abutments to a railroad bridge. Petitioner urges that the work on certain of the railroad, highway, and telephone projects constituted "new construction" and therefore was not "in commerce" (Pet. 13–14). These projects were found by the court below to be "vital to the functioning of" existing instrumentalities of commerce and therefore "well within the *Pedersen* rule" (R. 206, 207). Obviously, they do not involve "new construction" any more than the construction of new abutments to a bridge held covered in the *Pedersen* case.[2]

Similarly, other circuit courts of appeals have applied the *Overstreet* and *Pedersen* decisions to so-called "new construction" on existing instrumentalities of interstate commerce. In *Walling*

[2] The "new construction" concept derives from decisions under the Federal Employers' Liability Act prior to its amendment in 1939. Relying on this Court's decision in *Virginian Railway* v. *System Federation*, 300 U. S. 515, the court below held that the limitations "imposed upon the phrase 'in commerce' under the Employers Liability Act" were inapplicable to the Fair Labor Standards Act (R. 207). If relevant at all to the Fair Labor Standards Act, the "new construction" concept should be applicable only to the construction of new instrumentalities of commerce and not to construction work on existing instrumentalities.

v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945 (C. C. A. 6), the Act was applied to employees engaged in the "new construction" of dykes and revetments to maintain and improve the Mississippi River as an instrumentality of commerce. And in *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (C. C. A. 9), the Act was held applicable to the construction of new retaining walls and dredging apparatus installed for the purpose of deepening the channels of a Navy Yard harbor. See also *Crabb* v. *Welden Bros.*, 65 F. Supp. 369 (S. D. Iowa); *Walling* v. *Craig*, 53 F. Supp. 479 (D. Minn.). Cf. *North Shore Corp.* v. *Barnett*, 143 F. 2d 172 (C. C. A. 5), modified on stipulation of the parties, 323 U. S. 679.

2. The decision below that work on projects involving reconstruction and expansion of industrial plants constitutes a process or occupation necessary to the production of goods for commerce likewise accords with the principles laid down by this Court and consistently applied by the circuit courts of appeals. Petitioner contends here also that certain of the projects are not covered because they involve "new construction" (Pet. 14). The test of coverage, however, is not whether work involves "new construction" but whether it is "necessary" to the production of goods for commerce. *Roland Electrical Co.* v. *Walling*, 326 U. S. 657, 663–664; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88. In the

latter case employees of a drilling contractor engaged in drilling new oil wells were held "necessary to the production" of oil even though their construction and drilling activities were concluded before any oil was struck. The "new construction" in the present case is more closely related to production than in the *Warren-Bradshaw* case in that the work here was designed to continue or expand existing productive facilities. See also *Culver* v. *Bell & Loffland,* 146 F. 2d 29 (C. C. A. 9), holding the Act applicable to the drillers of "dry holes" (or non-productive or unsuccessful wells); *E. C. Schroeder Co.* v. *Clifton,* 153 F. 2d 385 (C. C. A. 10), certiorari denied, June 3, 1946, rehearing denied October 14, 1946, holding that employees engaged in "new construction" of a dyke to prevent the flooding of an oil field were necessary to the production of oil.

Petitioner further contends that the projects are too remote from actual productive operations to fall within the scope of the phrase "necessary to production" (Pet. 15–17). However, the maintenance of plant grounds and roadways, to keep them in usable condition and prevent floods, landslides, or cave-ins resulting from improper drainage, would seem to be at least as necessary to production as "the maintenance of a safe, habitable building" (*Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 524) or the prevention of theft or fire. *Walton* v. *Southern Package Corp.,* 320 U. S. 540; *Armour*

& Co. v. *Wantock*, 323 U. S. 126. See also *Bowie* v. *Gonzales*, 117 F. 2d 11, 20 (C. C. A. 1); *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. 2d 863, 866 (C. C. A. 9), certiorari denied, 323 U. S. 764.

3. The decision below is not in conflict with that of any other circuit court of appeals. *Nieves* v. *Standard Dredging Co.*, 152 F. 2d 719 (C. C. A. 1), and *Noonan* v. *Fruco Construction Co.*, 140 F. 2d 633 (C. C. A. 8), asserted to be in conflict with the decision here (Pet. 14), are quite distinguishable. The *Nieves* case involved the construction of a new naval base in a "swampy, almost entirely uninhabited wilderness." 152 F. 2d at 719. This work hardly related to an existing instrumentality of commerce. And the *Noonan* case involved the construction of an entirely new munitions plant. It did not appear, as it does here, that the facilities under construction constituted "integral parts" of existing plants (R. 209). Thus, irrespective of whether the *Nieves* and *Noonan* decisions are correct, they do not conflict with the decision in this case.

CONCLUSION

Although the case involves an important application of the Act to the construction industry, it raises no problems which may not be resolved by applying principles already settled by this Court.

For this reason we do not believe it necessary that the petition for certiorari be granted.

Respectfully submitted.

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